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No. 93-623

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

VALLEY FORGE INSURANCE CO.,
Petitioner,

v.

DARLENE STRICKLAND, Mother and Next Friend of TINA STRICKLAND, and DARLENE STRICKLAND, Individually,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents Darlene Strickland, Mother and Next Friend of Tina Strickland, and Darlene Strickland, Individually, respectfully oppose the petition of Valley Forge Insurance Company for a writ of certiorari to review the decision of the Supreme Court of Mississippi.

STATEMENT

Respectfully, Respondents assert that Petitioner attempts to raise an issue that was not raised succinctly at the appellate court level. On appeal to the Mississippi Supreme Court, Petitioner generically raised as its only Constitutional issue regarding punitive damages:

> V. The punitive damages award against Valley Forge violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution.

This Court has previously refused to consider issues concerning punitive damages first succinctly raised only to this Court. (*Cf. Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 1039, 113 L.Ed2d. 1 (1991)).

As discussed in Rule 15.1 of this Court's Rules, Respondents wish to point out a gross misstatement of fact by Petitioner in its Statement where Valley Forge asserts that prior to the November 28, 1988, offer of Nationwide to pay Tina its policy limits," . . . Valley Forge had never asserted subrogation rights with respect to the Nationwide policy . . . ." (*Cf.* page 3, Petition of Petitioner.) Petitioner's File Activity Sheet reflects that Valley Forge's adjuster (its trial representative) sent a first lien letter to Nationwide's policyholder with a copy to Nationwide's adjuster on November 30, 1987. (Ex. 6 to Tr. Ex. 5.) That letter requested one of the tortfeasor's, Nationwide's policyholder, and Nationwide contact Valley Forge within ten days to make financial arrangements for repayment.

Respondents also wish to point out the omission by Petitioner of the most critical fact/evidence regarding the punitive damages award. The applicable insurance contract which governed the binder in effect at the time of the accident contained a Louisiana endorsement/amendment to comply with Louisiana law.[1] Without the Uninsured Motorists Coverage Amendment—Louisiana, Petitioner would have had arguendo, under its standard insurance contract with a court-authorized signing of Petitioner's Subrogation Receipt, Ex. 35 to Trial Ex. 4, the

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[1] UNINSURED MOTORISTS COVERAGE AMENDMENT—LOUISIANA

II. GENERAL PROVISIONS

Paragraph A of *Our Right To Recover Payment* provision of part F *does not apply to damages an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle"* as defined in Section 2, of the definition of "uninsured motor vehicle" under Part C. (Trial Ex. 3) (Emphasis Respondents'.)

right of subrogation to any and all funds available from the tortfeasors.[2-3] The Subrogation Receipt purported to assign to Petitioner ". . . all the rights, claims, interest, choses or things in action to the extent of the amount paid . . .". (Ex. 35 to Tr. Ex. 5, p. 263). This was done without consideration that the defined insured was a minor; her damages, as determined by Petitioner, while the child was still in a coma in the hospital, were then valued at over $205,000.00; Petitioner knew before its payment that the maximum amount of all other insurance from the tortfeasors amounted to $35,000; without any court approval, Petitioner required Petitioner's Subrogation Receipt to be signed by the child's parents before the disbursement by any funds paid by Petitioner; and, with Petitioner having full knowledge that subrogation by it violated not only Louisiana statutory law, but also the terms of Petitioner's own Uninsured Motorists Coverage Amendment-Louisiana, to its insurance contract. (Appendix B, pages 16a and 26a, Petition of Petitioner.)

SUMMARY OF RESPONDENTS' ARGUMENT

Mississippi Supreme Court standards for the imposition and review of punitive damages provide sufficiently definite and meaningful constraints on the fact finder's discretion so as to satisfy the Due Process Clause of the Fourteenth Amendment. *Pacific Mutual Life Ins. Co. v.*

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[2] Pertinent parts of Petitioner's insurance contract are set forth in this Brief in Opposition from the trial court's Judgment and Opinion with the emphasis contained therein being the trial court's. Appendix B, pages 19a and 20a, Petition of Petitioner. The quoted parts are from Trial Ex. 3, at pages 1, 4, 8 and the last page of that exhibit.

[3] La.C.C. art. 2162. Louisiana law precludes subrogation until the defined insured is paid the full amount the insured is legally entitled to recover as damages. With other insurance available to be recovered, under the facts of this case, Strickland does not believe than any Louisiana court would have authorized the signing of Petitioner's Subrogation Receipt which makes the failure to obtain court authorization even more significant.

Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, —— U.S. ——, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *Eichenseer v. Reserve Life Ins. Co.*, 934 F2d 1377 (5th Cir., 1991).

The award of punitive damages in this case did not violate Petitioner's perceived substantive due process rights and was certainly neither excessive nor arbitrary. *Haslip*, supra; *TXO*, supra; *Eichenseer*, supra.

ARGUMENT

Eichenseer was remanded by this Court in 1991, to the Fifth Circuit Court of Appeals for reconsideration, in light of *Haslip*, of Mississippi's procedures for review of a punitive damages award to insure no violation of due process.

Question 1.

The Fifth Circuit in its review of *Eichenseer* found that:

> Whether an award is large or small, however, the procedural protection need not be exhaustive. As long as there is some meaningful procedural assurance that the amount of the award is not an impulsive reaction to the wrongful conduct of the defendant, the award survives the procedural protection aspect of the due process analysis in *Haslip*. In the instant case, we conclude that the procedure used in assessing and reviewing the amount of the punitive damages award was constitutionally sufficient.

Eichenseer, 934 F.2d at 1385. In essence, that court found that the Constitutional safeguards regarding the awarding and reviewing of punitive damages in view of this Court's *Haslip* decision, in Mississippi, were constitutionally sufficient. That court further said:

> Mississippi law limits the amount of punitive damages that a trial court can impose against a defendant. The trial court does not possess unbridled discretion

> to fashion the amount of a punitive damages award. Rather, under Mississippi law, the trial court determines an appropriate amount of damages with reference to the following factors: (1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future; (2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses; (3) The pecuniary ability or financial worth of the defendant. *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985). The court should also consider the degree of the offense, the presence or absence of malice, the motive behind the actions, the injury intended, and the public sense of justice and propriety. See *Mutual Life Ins. Co. v. Estate of Wesson*, 517 So.2d 521, 532 (Miss.1987), cert. denied, 486 U.S. 1043, 108 S.Ct. 2035, 100 L.Ed.2d 620 (1988).
>
> Without question, these criteria leave the trial court significant discretion in its determination of punitive damages. But this discretion is not unlimited.

Eichenseer, 934 F.2d at 1385.

As in the case *sub judice*, in *Eichenseer*, the district court in a bench trial rendered an exhaustive opinion from its finding of facts, and its judgment was based on, as in the case *sub judice*, the egregiousness of the insurance company's conduct with an eye toward the approved public policy goals of deterrence and retribution.

In the case *sub judice*, the Chancellor [4] in his Judgment and Opinion in answer to the question of whether Petitioner was entitled to subrogation or offset, found:

> Applyng Louisiana law, and the Valley Forge policy itself, this question must be answered in the negative.

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[4] Mississippi's highest level of trial courts is bifurcated. The law side is generally in the circuit court side and is presided over by a circuit judge. The equity side, where this case was filed by Petitioner and ultimately tried, is presided over by a chancellor.

By the express terms of its insurance policy, Valley Forge provided that it would not be entitled to subrogation where the damages to the insured exceeded both the Valley Forge policy limits and the limits of other insurance companies.

The "Uninsured Motorists Coverage Amendment-Louisiana," which is the last page of the contract, part II, General Provisions, provides as follows:

Paragarph A. of the Our Right To Recover Payment provision of Part F *does not apply to damages an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle"* as defined in Section 2 of the definition of "uninsured motor vehicle" under Part C. [Emphasis added.]

Referring to Paragraph A. of Part F, we find that the following provision, in pertinent part, is the one described as *inapplicable*:

> A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right.

The definition of "uninsured motor vehicle" is also provided in the amendment, under Part I Paragraph B:

Section 2. of the definition of "uninsured motor vehicle" is replaced by the following:

> "Uninsured motor vehicle" means a land motor vehicle or trailer of any type.

2. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is not enough *to pay the full amount the "insured" is legally entitled to recover as damages.* [Emphasis added.]

Tina Strickland was an insured, riding in a vehicle covered by a liability insurance policy of $25,000.00, far less than the amount of her damages, which Valley

> Forge admits exceeded $205,000.00. Thus, the Aull vehicle was an uninsured motor vehicle under the policy. Under the "Uninsured Motorists Coverage Amendment-Louisiana," the subrogation provision of the policy does not apply to damages the insured is entitled to recover from the owner and operator of the uninsured motor vehicle. By the express terms of its own policy, Valley Forge has *no subrogation right*.

(Emphasis, the trial court's.) Appendix B, pages 19a and 20a, Petition of Petitioner.

The Chancellor, after the finding of those facts set forth above, considered the question of whether it should assess punitive damages against Valley Forge. The court there considered the same elements as later enumerated in *Eichenseer*. When considering whether to award punitive damages, and not as Petitioner suggests, the trial court first considered the egregious conduct of Petitioner's asserting a right of subrogation when by the express terms of its own policy and applicable Louisiana law, Petitioner had no subrogation right.

In awarding the unconditional $1,000,000 punitive damages, without knowing that later the same year this Court would decide *Haslip*, or, that the next year the Fifth Circuit would reconsider *Eichenseer*, the trial court applied those principals in determining its unconditional award. The trial court found:

> Against this backdrop, Valley Forge has asserted subrogation/offset rights to receive the Aull-Nationwide $25,000.00 to the exclusion of Tina, notwithstanding Valley Forge's actual knowledge that Tina's damages greatly exceed *all* insurance coverage potentially available. Valley Forge's subrogation/offset assertion is made in the face of Valley Forge's own policy provisions and Louisiana law, both clearly to the contrary of Valley Forge's assertion. Valley Forge seeks to justify its assertion by saying it did so only because Tina was not seeking recovery of the $25,000.00 from Aull-Nationwide and that Missis-

> sippi law allowed offset. Valley Forge ignores the fact that the Stricklands' attorney in 1987 had demanded payment from Aull-Nationwide and filed suit in Louisiana in June, 1988, seeking recovery from Aull-Nationwide and Cromwell-Automotive. The facts belie Valley Forge's assertion.

(Emphasis, the trial court's.) Appendix B, page 26a, Petition of Petitioner.

The trial court was knowledgeable of the pecuniary ability and financial worth of Petitioner in awarding unconditionally the $1,000,000 punitive damages. The trial court awarded the amount necessary for the punishment of the wrongdoing of Petitioner making it an example to others in the hope of deterring it and others in the future from such reprehensible conduct as asserting a right of subrogation which it had expressly relinquished by its policy binder, not to mention applicable Louisiana law, the state in which the policy binder was issued. It is evident that the trial court considered both the malice and degree of the offense: Petitioner's asserting a right it claimed to have, with the motive of unjustly enriching itself to the economic injury of a brain-damaged minor. Certainly the public sense of justice and propriety of such action was appalled by such reprehensible and unfathomable conduct.

The Mississippi Supreme Court used without citation the pronouncements of this Court in *Haslip* and *TXO* (Valley Forge's Petition for Rehearing having been denied after *TXO* was decided) and the Fifth Circuit's reconsideration of *Eichenseer*. In fact, the Mississippi Supreme Court specifically used almost identically the above-cited verbiage of *Eichenseer* in reviewing the punitive damages award.

> No hard and fast rule exists for establishing the maximum amount of punitive damages awardable in any given case. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss.1990); *Bankers Life*

> *and Cas. Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985). Instead, the amount must be considered in light of several factors. First, the amount awarded should serve to punish the insurer and to deter it from committing similar offenses in the future. Second, the amount should serve as an example set to deter others from committing similar offenses. Third, the amount awarded should account for the insurer's pecuniary ability and financial worth. And fourth, the amount constitutes compensation for the plaintiff for his or her "public service" in bringing the action. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172 (Miss.1990).

Valley Forge Ins. CNA v. Strickland, 620 So.2d 535, 540-541 (Miss. 1993). Appendix A, page 11a, Valley Forge's Petition. Petitioner had specifically called to that court's attention in its brief *Haslip*, in oral argument both *Haslip* and the then pendency of this Court's consideration of *TXO* and then again in its Petition for Rehearing both of those cases.

The Mississippi Supreme Court agreed with the lower court's finding of facts when it said:

> On appeal, an award will be disturbed only where it is so excessive that it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience of the court. *Williams*, 566 So.2d at 1190; *Crenshaw*, 483 So.2d at 278.
>
> The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases. See e.g., *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss.1990) (5¼ percent of net worth affirmed). Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias, or prejudice on the part of the chancellor.

Strickland, 620 So.2d at 541. Appendix A, page 11a, Petition of Petitioner. In fact, while adding the *Eichenseer* elements, it continued the traditional standard of "so excessive that it evinces passion, bias and prejudice on the part of the [trier of fact] so as to shock the conscience of the court." As the Supreme Court of Appeals of West Virginia did in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), the Mississippi Supreme Court compared the punitive award in *Strickland* to similar cases and found that this award was proportionately lower. The Mississippi Supreme Court went even further. It restated a more limiting standard than discussed in *Haslip*, *TXO*, or *Eichenseer*.

> [P]unitive damages in Chancery Court are not favored and are to be allowed only with caution and within narrow limits.

Strickland, 620 So.2d at 541. Appendix A, page 12a, Petition of Petitioner.

Petitioner, in essence, complains that the Mississippi Supreme Court when considering the question of whether the punitive damages award against Petitioner violated the Fourteenth Amendment to the United States Constitution and the Mississippi Constitution, did not go to sufficient length in addressing that issue. The opinion simply stated:

> This issue was definitively resolved by this Court in *Ivy v. General Motors Acceptance Corporation*, 612 So.2d 1108 (1992) ("In sum, this Court rejects GMAC's contention that Mississippi's system of awarding punitive damages is unconstitutional.") Under the ruling in Ivy, this assignment of error is without merit.

Strickland, 620 So.2d at 541-542. Appendix A, page 13a, Petition of Petitioner. Petitioner has failed to take into consideration that the Mississippi Supreme Court in *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss. 1990), an ante-*Haslip*, but post-*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-80, 108

S.Ct. 1645, 100 L.Ed.2d 62 (1988) decision, reviewed in detail the standards for the imposition of punitive damages which historically have been seldom awarded in Mississippi. (*Cf. Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d at pages 1182-1192.) The Mississippi Supreme Court again reviewed punitive damages awards in Mississippi in *Ivy v. General Motors Acceptance Corporation*, 612 So.2d 1108 (1992) in light of *Haslip* and found that Mississippi did have constitutionally sound standards which did provide sufficiently definite and meaningful constraints on the fact finder's discretion so as to satisfy the Due Process Clause. Examples of those constraints are in *Ivy*, where the Mississippi Supreme Court refused to reinstate a jury award of $100,000 in punitive damages, and in this very case, *Strickland*, in which the Mississippi Supreme Court reversed and rendered the "condiitonal" second $1,000,000 of punitive damages; this despite the representation of Petitioner that there has been only a single instance where there has been a significant reduction in a punitive damages award.[5] (*Cf.* Petition of Petitioner, page 14.)

Mississippi has sufficiently definite and meaningful constraints on the fact finder's discretion to satisfy the Due Process Clause. Among those constraints are the following factors: (1) such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future; (2) such amount as is reasonably necessary to make an example of the defendant so that others may be deterred

[5] There have been at least five post-*Haslip* decisions by the Mississippi Supreme Court which have reversed and/or rendered punitive damages awards. *Dynasteel Corp. v. Aztec Industries, Inc.*, 611 So.2d 977 (Miss., Dec. 31, 1992), $15,000; *Snow Lake Shores Property Owners Corp. v. Smith*, 610 So.2d 357 (Miss., Dec. 10, 1992), $5,900; *Finkelberg v. Luckett*, 608 So.2d 1214 (Miss., Aug. 19, 1992), $1,500,000 by a chancellor; *Universal Life Ins. Co. v. Veasley*, 610 So.2d 290 (Miss., Feb. 19, 1992); $175,000; *Strickland v. Rossini*, 589 So.2d 1268 (Miss., Nov. 13, 1991), $62,000.

from the commission of similar offenses; (3) the pecuniary ability or financial worth of the defendant; (4) the degree of the offense; (5) the presence or absence of malice; (6) the motive behind the actions; (7) the injury intended; (8) the public sense of justice and propriety; (9) in this case, punitive damages in Chancery Court are not favored and are to be allowed only with caution and within narrow limits; and, (10) even given all of the foregoing having been found against the wrongdoer, the review process still must consider whether the award is so excessive that it evinces passion, bias and prejudice on the part of the trier of fact so as to shock the conscience of the court.

As this Court said in *Haslip*,

> So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. [Citation omitted.] In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional. " 'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " [Citations omitted.] As the Court in Day v. Woodworth made clear, the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's test or history indicates an intention on the part of its drafters to overturn the prevailing method. [Citations omitted.]

Haslip, 111 S. Ct. at 1043.

After reviewing the *Haslip* instructions, this Court found

> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was con-

> fined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App. 106. The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
>
> These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decision making and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied.

Haslip, 111 S. Ct. at 1044.

The trial court, by imposition of its punitive damages award, sought only deterrence and retribution, the state policy concerns sought to be advanced. The trial court award was based on a thorough consideration of the character and the degree of the wrong committed by the Petitioner as shown by the evidence (asserting a claim for subrogation when it did not have one) with the only goal being preventing a similar wrong in the future by Petitioner or some other entity. Certainly, the trial court knew the nature and purpose of punitive damages was punishment for the civil wrongdoing of Petitioner, and that the imposition was not compulsory. In short, the trial court, and subsequently the Mississippi Supreme Court, recognized the award to be in furtherance of Mississippi's appropriate public policy of deterrence and retribution.

Haslip also found factors

> "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." Ibid. The Hammond test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

Haslip, 111 S. Ct. at 1044. The Mississippi Supreme Court found, as the trial court had found in its Judgment and Opinion [6], that under Petitioner's own policy, it had no subrogation right. It asserted its subrogation right by intentionally withholding from both its trial counsel and Respondents' counsel (despite timely discovery requests) a copy of the applicable policy until the day before trial. There can be no question regarding Petitioner's culpability, demonstrated by its filing a foundationless declaratory judgment action when Petitioner well knew that such violated not only applicable Louisiana law, but the terms of its own policy.

Mississippi has a implicit mandatory public policy obligation to protect its citizens. In the furtherance of this policy, Mississippi must discourage others from this and similar conduct and, to the greatest extent possible, minimize the impact on innocent third patries such as here, Petitioner's defined insured, the minor Tina Strickland. (As a result Tina lost the use of desperately needed funds, unquestionably suffering serious damages. *Strickland*, 620 So.2d at 540.)

The Mississippi Supreme Court did undertake a comparative analysis.

> In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases.

Strickland, 620 So.2d at 541.

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[6] **Appendix B, Petition of Petitioner, page 20a.**

This Court by dicta approved the refinement of Alabama's punitive damages award review when it considered that court's decision in *Central Alabama Electric Cooperative v. Tapley*, 546 So.2d 371, 377-378 (Ala. 1989) in *Haslip*.

> It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.
>
> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages.

Haslip, 111 S.Ct. at 1045. The record from the *Strickland* case discloses that each element approvingly mentioned by this Court in *Haslip* from *Central Alabama* was fully considered by both the trial and appellate courts, with the possible exception of the imposition of criminal sanctions and the existence of other civil awards against the defendant for the same conduct. Respondents are not cognizant of other civil awards, but Petitioner admits

in its Petition to the commission of the same conduct.[7] In fact, Petitioner's trial representative testified that even where a minor was involved, even if it was Petitioner's insured, routinely a subrogation receipt was executed.[8-9]

Respectfully, Respondents believe that it has been demonstrated that the trial and appellate courts in the case *sub judice* went beyond *Haslip* in providing sufficient definite and meaningful constraints and certainly satisfy the Due Process Clause of the Fourteenth Amendment.

As to this Court's pronouncements in *TXO*:

> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

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[7] Petition of Petitioners, page 3.

> . . . ([A]lthough upon paying Tina's claim, Valley Forge did have the Stricklands execute certain forms, *including a subrogation receipt, as a matter of routine*). (Emphasis, Respondents'.)

[8] With the check, Petitioner's adjuster forwarded the Subrogation Receipt and Release and her business card, upon which she wrote the following note:

> "Bob-Please have attached properly executed & returned *prior to disbursing funds.* Thanks, d.n." (Tr. Ex. 5, p. 47; Dep. Ex. 18.) (Emphasis, Respondents'.)

[9] Petitioner's trial representative testified that she *never* got court approval of a claim under a CNA policy for a minor child or a CNA insured. (Tr. Ex. 5, dep. p. 55) At trial it became evident that this included instances when the CNA insured was actually the tortfeasor! (Tr., pages 89, 90.) Thus, her customary practice in both Louisiana and Mississippi was to allow the parents of the minor to settle the minor's claim *even when the parent was the negligent party.* (Emphasis, Respondents'.)

TXO, 113 S.Ct. at page 2722-2723. In the case *sub judice*, excluding attorneys' fees, the actual damages suffered by Tina exceeded $80,000.00. The actual damages were more than four times those in *TXO*; the punitive damages award was $1,000,000, one-tenth that of *TXO*. Though the amount of money potentially at stake is less here, the factors announced by this Court in *TXO* are basically the same. The bad faith of Petitioner in assertting through its declaratory judgment action a right of subrogation which by the express terms of its own policy it had expressly relinquished by contract, and which it did not have under applicable Louisiana law, amounts to reprehensible conduct.

This is a scheme employed by Petitioner not only in this case, but is its customary practice in both Louisiana and Mississippi. In fact, it is Petitioner's customary practice in both Louisiana and Mississippi to allow the parents of the minor to settle the minor's claim even when the parent was the negligent party. (Tr., pages 89, 90.) Also, it is Petitioner's customary practice in all uninsured motorist claims processed by Petitioner in Louisiana and Mississippi always to obtain a Subrogation Receipt and a Release. (Tr. Ex. 5, Dep. Ex. 18.) This practice continues now (*Cf.* Petition of Petitioner, page 3). Respondents submit that Petitioner's customary practice, at least in Louisiana and Mississippi, constituted then, as it does now, a larger pattern of fraud, trickery and deceit where lay persons who are insured by Petitioner may execute unknowingly Petitioner's Subrogation Receipt assigning to Petitioner their rights against tortfeasors, thereby relinquishing forever their right to be made whole by full recovery of all damages due them. As TXO knew Alliance had good title to the oil and gas rights, certainly Petitioner knew under the terms of its own policy through the Uninsured Motorist Coverage Amendment-Louisiana that it had no legal right to seek subrogation until its insured, the minor Tina Strickland, had recovered all obtainable damages due her. The only winner in Valley

Forge's scheme would be Valley Forge, who, if successful, would recover all, or at least part, of what it had contracted to pay its own insureds, to the detriment of its insureds. Valley Forge intended to profit by its unconscionable scheme; the trial court recognized this and awarded punitive damages to remove that desirability and to have Valley Forge sustain a loss in the same manner as this Court approved subsequently in *Haslip*.

The wealth of Petitioner was considered by both the trial and appellate courts of Mississippi who found the punitive damages award reasonable and, as the Mississippi Supreme Court said, lower than in other similar cases. As in *TXO*, the punitive damages award was not so grossly excessive as to be beyond the power of the State to allow.

The initial amount in controversy in Valley Forge's action for a declaratory judgment, $25,000, the policy limits of another tortfeasor's insurance, may not seem to some a lot of money; but to a brain-damaged child it equates, at least proportionately, to the potential loss Alliance would have suffered. As this Court said:

> It is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.

TXO, 113 S.Ct. at page 2721-2722. This rationale was unquestionably the reason for the punitive damages award by the trial court and the finding by the Mississippi Supreme Court that Petitioner's conduct was sufficiently egregious to justify punitive damages.

As this Court noted,

> [W]e do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. . . . Furthermore, the fact that our cases have recognized for almost a century that the Due Process

> Clause of the Fourteenth Amendment imposes an outer limit on such an award does not, of course, make that clause "the secret repository of all sorts of other, unenumerated, substanitve rights,"

TXO, 113 S.Ct. at page 2720, n.24.

The case *sub judice* is distingiushable from this Court's criticism of the trial judge in *TXO*. In the case *sub judice* the trial judge wrote a sixteen page Judgment and Opinion clearly articulating his reasoning in the punitive damages award. The unconditional punitive damages award was unanimously approved by the appellate court.

As this Court concluded in *TXO*,

> In any event, the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct. *Haslip*, 499 U.S., at 24, n. 12, 111 S.Ct., at 1046, n. 12.

TXO, 113 S.Ct. at page 2724. Petitioner had notice of the potential for a punitive damages award even before it consulted its Mississippi trial counsel and positively before litigation ensued because it knew that under the terms of its own policy through the Uninsured Motorist Coverage Amendment-Louisiana that it had no legal right to seek subrogation. Petitioner's representative had testified at the Rule 30(b)(6) deposition of Petitioner that the "policy" there produced was a sample and trial counsel for Petitioner said that a certified copy of the policy that would have issued was on the way. (Tr. Ex. 5, dep., p. 16, 18.) Undoubtedly, Petitioner was aware of Respondents' counterclaim which demanded a punitive damages award. Petitioner had more than ample notice.

As Mr. Justice Kennedy said in *TXO*:

> As I have suggested before, see id., at 41, 111 S.Ct., at 1054 (KENNEDY, J., concurring in judgment), a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so.

TXO, 113 S.Ct. at page 2725 (Kennedy, J., concurring). The reasons, as above indicated, for the punitive damages award in this litigation are legion. Without again reciting those, Respondents submit that the trial court exhibited a logical and rational concern for deterrence and retribution in that award and that therefore, the Due Process Clause and the Constitution, as a whole, were not violated. As in *TXO*, the record here clearly supports that Petitioner knowingly acted with specific intent to recover monies to which it was not entitled. That is malice. The trial court's decision to assess punitive damages at $1,000,000 was more than justified and was done within sufficiently definite and meaningful constraints to satisfy the Due Process Clause.

It was rational for the trial court to place great weight on the evidence of Petitioner's deliberate, wrongful conduct in determining that an assessment of punitive damages was required in order to serve the goals of punishment and deterrence. The record of this case, when viewed as a whole, makes it abundantly clear that the trial court's decision was motivated by a legitimate concern for punishing and deterring Petitioner, rather than by bias, passion or prejudice. There was ample evidence of willful and malicious conduct by Petitioner in this case. See *TXO*, 113 S.Ct. at page 2726 (Kennedy, J., concurring).

Mr. Justice Scalia predicted in his concurring opinion in *TXO* the "spawn[ing] [of] wasteful litigation." *TXO*, 113 S.Ct. at page 2728 (Scalia, J., concurring). Respondents admit that neither the trial court (at the time of the trial *Haslip* had not been decided) nor the Mississippi Supreme Court specifically made reference in their opinions to this Court's decisions. Nevertheless, an examination of the Mississippi court's decision suggests that due consideration was given the very concerns this Court voiced in both *Haslip* and *TXO*. Valley Forge's Petition is wasteful litigation because there are no true Constitutional issues that remain.

The trial court and the Mississippi Supreme Court applied sufficiently definite and meaningful constraints to satisfy the Due Process Clause in awarding and affirming the punitive damages in this litigation.

Question 2.

The other question Petitioner raises is, in Petitioner's view, whether the punitive damages award was so excessive and arbitrary as to violate Petitioner's substantive due process rights.

Respondents begin this response with the comment of the Court previously noted herein:

> [W]e do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. . . . Furthermore, the fact that our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award does not, of course, make that clause "the secret repository of all sorts of other, unenumerated, substantive rights,"

TXO, 113 S.Ct. at page 2720, n.24.

Also, Mr. Justice Scalia, joined by Mr. Justice Thomas, in *TXO* said:

> I do not, however, join the plurality opinion, since it makes explicit what was implicit in *Haslip*: the existence of a so-called "substantive due process" right that punitive damages be reasonable, see ante, at 2720. [Footnote omitted.] I am willing to accept the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights; but I do not accept the proposition that it is the secret repository of all sorts of other, unenumerated, substantive rights —however fashionable that proposition may have been (even as to economic rights of the sort involved

> here) at the time of the Lochner-era cases the plurality relies upon, see ante, at 2731-2732. It is particularly difficult to imagine that "due process" contains the substantive right not to be subjected to excessive punitive damages, since if it contains that it would surely also contain the substantive right not to be subjected to excessive fines, which would make the Excessive Fines Clause of the Eighth Amendment superfluous in light of the Due Process Clause of the Fifth Amendment.

TXO, 113 S.Ct. at pages 2726-2727 (Scalia, J., concurring). Also,

> Today's reprise of *Haslip*, despite the widely divergent opinions it has produced, has not been a waste. The procedures approved here, ante, at 2723-2724 (plurality opinion), are far less detailed and restrictive than those upheld in *Haslip*, supra, at 19-23, 111 S.Ct., at ——, suggesting that if the Court ever does invent new procedural requirements, they will not deviate significantly from the traditional ones that ought to govern. And the disposition of the "substantive due process" claim demonstrates that the Court's " 'constitutional sensibilities' " are far more resistant to " 'jar [ring],' " ante, at 2722 (plurality opinion) (quoting *Haslip*, supra, at 18, 111 S.Ct., at 1043), than one might have imagined after *Haslip*.

TXO, 113 S.Ct. at page 2727 (Scalia, J., concurring).

As the Court said in *Haslip*, and reiterated in *TXO*,

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.

Haslip, 111 S. Ct. at 1043 (*Cf. TXO*, 113 S.Ct. at page 2720.) The Fifth Circuit in its review of *Eichenseer* rightfully offered no such suggestion when it said:

> In essence, the Court in *Haslip* reasoned that the constitutionality of an award of punitive damages

> is a function of two practical considerations: (1) whether the circumstances of the case indicate that the award is reasonable, and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the factfinder.

Eichenseer, 934 F.2d at 1381. The Fifth Circuit interpreted this Court's decision and said:

> In particular, the Court identified a couple of facts that supported the amount of the award in *Haslip*: (1) the conduct in question was reprehensible, and (2) society has a significant interest in discouraging insurers from similar conduct. Id. These facts sufficiently indicated that the punitive damages award in *Haslip* was reasonable.

Eichenseer, 934 F.2d at 1381. In *Eichenseer*, the Fifth Circuit found that those factors existed. The punitive damages award of $500,000, despite the actual damages award of only $1000 (the insurance company having paid pre-trial the $6658.35 in medical expenses), was not so excessive and arbitrary as to violate Petitioner's substantive due process rights, despite the fact that the punitive award in *Eichenseer* was more than 65 times the sum of the actual damages award and the $6658.35 in medical expenses paid pre-trial and more than 500 times the actual damages award.[10]

In the Fifth Circuit's review of *Eichenseer*, as to the question of excessiveness under Mississippi law, the court there said:

> Thus, after *Haslip*, an award of punitive damages is constitutional if the circumstances of the case indicate that the award is reasonable and the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the

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[10] For purposes of comparison, in the instant case the punitive award is 12.5 times the actual daamge award, excluding court-awarded attorneys' fees and expenses.

> discretion of the factfinder. This is a fact intensive analysis. On appellate review of a punitive damages award, a court must carefully consider the nature of the wrong and the status of the parties. The touchstone of constitutionality under *Haslip* is not the amount of the award in the abstract. The size of an award of punitive damages and the relationship between the award and the amount of compensatory damages are relevant factors in determining whether the award is constitutional, but these factors are not dispositive.

Eichenseer, 934 F.2d at 1381-1382. Also,

> Under *Haslip*, an award of punitive damages does not meet constitutional requirements unless the circumstances of the case indicate that the award is reasonable. This condition, contrary to the assertion of Reserve Life, is not a vehicle for expansive appellate review of punitive damages awards. It creates, instead, a narrow channel for appellate review in which the focus of a reviewing court is to ensure that, under the circumstances of the case in question, the award of punitive damages is not grossly excessive or unreasonable.

Eichenseer, 934 F.2d at 1382. Thereafter, as a footnote, the Fifth Circuit reviewed prior pronouncements of this Court and said:

> The Due Process Clause does not prohibit large damage awards—or even susbtantial damage awards. Rather, the Due Process Clause forbids damage awards that are "grossly excessive," *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111, 29 S.Ct. 220, 227, 53 L.Ed. 417 (1909), or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919).

Eichenseer, 934 F.2d at 1382, n.6. In speaking to the amount of a punitive damages award, the court found that

the trier of fact was best suited to determine the amount of a punitive damages award because it had received the evidence and best knew the facts peculiar to that particular case. The court then said:

> Accordingly, in reviewing the constitutionality of an award of punitive damages, a court may not explicitly or implicitly recalculate the award of damages; moreover, it may not express an opinion whether the award is too high or too low. [Footnote omitted.] Rather, the court may only consider whether the circumstances of the case offer some support for the amount of the award. *If there are any circumstances of probative force that support the amount of the award, then the award meets the "reasonableness" prong of the due process test in Haslip.*

Eichenseer, 934 F.2d at 1382. (Emphasis, Respondents'.) Petitioner maintains through a footnote, using a phrase taken totally out of context, that the Mississippi Supreme Court found Petitioner was not "sufficiently culpable to justify punitive damages." This assertion is so misleading as to stretch the bounds of advocacy. The entirety of the sentence from which that phrase was lifted explains clearly that it deals only with the "conditional" second $1,000,000 punitive damages award, which the Mississippi Supreme Court reversed and rendered.[11]

The Fifth Circuit concluded that the punitive damages award in *Eichenseer* was supported by the record; that the conduct of the insurance company there was particularly egregious and done in reckless disregard of its insured. In the case *sub judice*, the Mississippi Supreme Court found in discussing the alleged excessiveness:

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[11] Furthermore, *we do not consider the conduct related to the settlement in Louisiana sufficiently culpable to justify punitive damages.* For the foregoing reasons, *we reverse the award of the second million dollars* as well as the alternative affirmative measures. (*Strickland*, 620 So.2d at 541, Appendix A, pages 12a-13a, Petition of Petitioner.) (Emphasis, Respondents'.)

> The $1,000,000 amount awarded unconditionally below is not shocking to the conscience of the Court. In fact the 1.5% of net worth awarded here is proportionately lower than in other similar cases. See e.g., *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172 (Miss.1990) (5¼ percent of net worth affirmed). *Given the egregiousness of Valley Forge's conduct in holding up Tina's recovery for her injuries*, as well as the serious actual damages suffered, it cannot be said that this award was so excessive as to evidence passion, bias, or prejudice on the part of the chancellor. Accordingly, this assignment of error is without merit.

Strickland, 620 So.2d at 541, Appendix A, pages 11a, Petition of Petitioner. (Emphasis, Respondents'.) The egregiousness comes specifically from the trial court's finding of fact that by the express terms of its own policy "Valley Forge has *no subrogation right*." (Emphasis, the trial court's.) Appendix B, page 20a, Petition of Petitioner. Petitioner, well knowing by its contract and applicable law, that it had no right of subrogation, in absolute defiance of both, instituted its complaint for the right to take as its profit the monies to which the minor was lawfully entitled. If the Fifth Circuit *Eichenseer* court was correct in finding that the conduct there, though egregious, was done with reckless disregard, then the trial court in Strickland, the Mississippi Supreme Court and this Court are more than justified by both law and fact in affirming the unconditional punitive damages award of $1,000,000; and, if in this Court's power, restoring to the minor the "conditional" second $1,000,000 punitive damages award, which the Mississippi Supreme Court reversed and rendered.

As the Fifth Circuit *Eichenseer* court concluded:

> Reserve Life's cavalier handling of Eichenseer's claim is *an unfortunate example of an insurer's desire to save money at the expense of its insureds*. A mere slap on the wrist is inadequate to punish such con-

> duct. Thus, the egregious nature of Reserve Life's conduct is a significant factor that supports the $500,000 award of punitive damages to Eichenseer.
> . . .
>
> The court's consideration of the deterrent effect of its award was proper. One of the fundamental purposes of punitive damages is to deter a wrongdoer from future misconduct. While the Due Process Clause requires that punitive damages not be grossly excessive, it does not require that punitive damages be ineffectual and impotent.

Eichenseer, 934 F.2d at 1383-1384. (Emphasis, Respondents'.) Respondents respectfully suggest Petitioner's motive was not saving money but, in effect, what common folk such as the author of this brief would call stealing money. Petitioner was not entitled to it, it was not Petitioner's; Petitioner, for profit, just wanted to capture it.

In *Haslip*, this Court approved the Alabama post-trial review procedures for scrutinizing punitive damages awards. Those procedures are:

> . . . [T]rial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." Id., at 1379. Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." *Ibid. The Hammond test ensures meaningful and adequate review by the trial court* whenever a jury has fixed the punitive damages.

Haslip, 111 S.Ct. at 1044. (Emphasis, Respondents'.) A review of the trial court's Judgment and Opinion shows that Petitioner received more than a meaningful and adequate review. The review by the appellate court complied with the *Haslip* approved standards by a com-

parative analysis, by ensuring that the award did not exceed an amount sufficient to accomplish Mississippi's goals of punishment and deterrence and that this appellate review made certain that the punitive damages were reasonable in their amount and rational in light of their purposes of punishing what occurred and deterring its repetition.

In view of the established facts, and after a thorough review by both the trial court and the Mississippi Supreme Court, the punitive damages award was not so excessive and arbitrary as to violate Petitioner's substantive due process rights. Respondents suggest that, under all applicable standards, a larger punitive damages judgment would have likewise been found not to be excessive, given the conduct of Valley Forge which led a careful and deliberate trial judge to render a judgment designed to meet Mississippi's legitimate goals of punishment and deterrence.

CONCLUSION

The petition addresses form and not substance. The chief complaint of Petitioner is that both the trial court and the Mississippi Supreme Court failed to refer specifically to *Haslip*, *TXO* and *Eichenseer* in their respective opinions. Obviously, the trial court could not because those cases had not been decided at the time of its Judgment and Opinion, June 26, 1990. The Mississippi Supreme Court's reference to *Ivy* in which it had reviewed Mississippi's procedures in *Haslip*'s light, was tantamount to citing *Haslip*. There it found that in *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d at pages 1182-1192, it had explained that a Mississippi judge or jury's discretion is limited or confined, that it had defined the nature and purpose of punitive damages, and that it, the Mississippi Supreme Court, did provide a substantive and comparative check on the amount which the jury awarded a plaintiff.

Mississippi, though perhaps not in form pleasing to Petitioner, but in substance, has addressed in a constitutionally sound manner each requirement of this Court's decisions in *Haslip* and *TXO*. Those requirements are in effect and were so before *Haslip* and were actually applied here with the Mississippi Supreme Court's reversing and rendering the trial court's award of the second $1,000,000.

Respectfully, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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